Filed 7/23/19 Herbert v. Superior Court CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DANIEL JOSEPH HERBERT, Petitioner, v. SUPERIOR COURT OF NAPA COUNTY, Respondent. THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	A156832 (Napa County Super. Ct. No. 17CR000158)

Proposition 64, approved by the voters on November 8, 2016, added section 11362.1 to California's Health and Safety Code, making it lawful for persons 21 years of age or older to possess up to 28.5 grams—roughly one ounce—of cannabis.[1] In November 2017, when Daniel Joseph Herbert was arrested, police found over a pound of marijuana in his car. Herbert pleaded no contest to a charge unrelated to his possession of the marijuana. After he was sentenced, Herbert filed a motion for return of 28.5 grams of the marijuana. The court denied the motion, ordering the destruction of the entire amount. Herbert petitions for a writ of mandate to compel respondent to vacate its order

[1] All undesignated statutory references are to the Health and Safety Code.

and to enter a new order granting his request for return of 28.5 grams of the marijuana. We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

On November 30, 2017, Herbert was arrested in a Walmart parking lot in Napa, California.[2] When Herbert attempted to leave the store without paying for items in his shopping cart, an asset protection associate approached him. Herbert fled into the parking lot, where he was arrested by a deputy sheriff from the Napa County Sheriff's Department. The deputy searched Herbert and found a concealed knife, methamphetamine, heroin, and suboxone pills. In the car Herbert was driving, the deputy found additional items from Walmart, and over a pound of marijuana.[3]

The information charged Herbert with three felonies and two misdemeanors, including the charge of carrying a concealed dirk or dagger. (Pen. Code, § 21310.) On October 9, 2018, Herbert pleaded no contest to this charge and the court dismissed the remaining charges. The court sentenced Herbert to eight months in prison.

On November 16, 2018, Herbert moved the court for return of the marijuana. The district attorney opposed the motion. At the hearing, Herbert requested the return of one ounce of the marijuana. The court stated it was "happy to put this over further . . . [but] I don't think that the government has the responsibility to weigh out a certain amount and give that to your client and then destroy the rest." The court continued the hearing to allow further research and stated the issue was whether Herbert "is entitled to have the one ounce of marijuana and everything else would be destroyed or whether the entire amount would be destroyed."

At the continued hearing, the court ordered the destruction of the entire amount. It stated "[t]he fact that this was an amount that was over the legal limit, I don't think that

---

[2] The facts are taken from the clerk's transcript and the preliminary examination transcript, which are attached as exhibits to Herbert's petition.

[3] At the preliminary examination, the deputy stated he found over a pound of marijuana in the car. In its response to Herbert's motion for return of property, the district attorney states the deputy found "two bags of marijuana weighing 58 grams and 1.7 pounds." If so, the actual amount seized was almost two pounds.

that justifies . . . that he should be entitled to anything below [the legal limit]. This may be a very good case to take on appeal; I honestly am going by what I think is the fair thing to do . . . ." To provide Herbert with sufficient time to appeal the issue, the court ordered that the marijuana was not to be destroyed until March 6, 2019, which was about 60 days after the hearing.

Herbert filed a notice of appeal.[4] Later, Herbert filed this petition for a writ of mandate.[5]

DISCUSSION

I. *Standard of Review and Rules of Interpretation*

"A writ of mandamus may issue to 'compel the [trial court's] performance of an act which the law specifically enjoins . . .' [citation], and mandamus is the appropriate remedy for a defendant in a criminal proceeding 'to compel the return of personal property wrongfully withheld by the custodial officers.' " (*Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, 108.) "In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) "If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language . . . . We adopt a construction 'that will effectuate

[4] Herbert concedes the challenged order is not directly appealable. (*People v. Hopkins* (2009) 171 Cal.App.4th 305, 308.) In his appeal, Herbert's appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. On July 16, 2019, we filed our opinion affirming the judgment against Herbert. (*People v. Herbert* (July 16, 2019, A156178) [nonpub.opn.].)

[5] The petition was filed on April 2, 2019, well after the court's 60-day hold on its order requiring destruction of the marijuana. Herbert did not request a stay of the court's order. There is no information in the record regarding whether the marijuana has been destroyed.

the voters' intent, giv[ing] meaning to each word and phrase, and avoid absurd results.' " (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 409.)

II. *Courts Must Order the Destruction of Controlled Substances Not Lawfully Possessed*

Relying on section 11362.1, Herbert contends the court should have ordered the return of 28.5 grams of the marijuana. This section provides that "it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to: [¶] [p]ossess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of cannabis not in the form of concentrated cannabis." (§ 11362.1, subd. (a)(1).) "Cannabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure . . . ." (§ 11362.1, subd. (c).)

Herbert claims the "statute does not state that possession of more than 28.5 grams automatically negates the legality of the lawful possession of 28.5 grams. The trial judge's interpretation of the statute does not make sense and imparts no significance to the clear intent . . . to decriminalize marijuana possession." For Herbert, the intent of the voters in passing Proposition 64 was to "legalize marijuana under state law, for use by adults 21 or older."

Herbert reads too much into the statute. Proposition 64 "legaliz[ed] marijuana for recreational use by adults, *subject to various conditions*." (*City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal.App.5th 1078, 1081, *italics added*.) As a result of Proposition 64, it is now lawful for persons 21 years of age or older to possess "not more than 28.5 grams." (§ 11362.1, subd. (a)(1).) But—unless another provision of law applies—possession of more than 28.5 grams by persons 21 years of age or older remains unlawful, and can be punished as a violation of section 11357, subdivision (b)(2), which makes it a misdemeanor for persons 18 years of age or older to possess more than this amount. (*People v. Perry* (2019) 32 Cal.App.5th 885, 889.)

Here, the deputy found over a pound of marijuana in the car Herbert was driving. In arguing the court should have ordered the return of 28.5 grams of it, Herbert relies exclusively on section 11362.1. By its express terms, this code section does not make Herbert's possession of over a pound of marijuana lawful. As a result, the marijuana was subject to seizure by the police. (§ 11362.1, subd. (c).) All seizures of controlled substances "shall be destroyed by order of the court, unless the court finds that the controlled substances . . . were lawfully possessed by the defendant." (§ 11473.5, subd. (a).) Under California law, cannabis remains listed as a Schedule I controlled substance. (§ 11054, subd. (d)(13).)[6] Based on the quantity found by the police, Herbert did not lawfully possess it, and the court was required to order its destruction. (*Chavez v. Superior Court*, *supra*, 123 Cal.App.4th at pp. 109–111 [denying petition for return of some of the marijuana seized because, based on the amount seized, qualified patient was not in lawful possession]).

In arguing otherwise, Herbert contends that if the police seize an amount of marijuana that is unlawfully possessed, then they should return 28.5 grams because "possession of up to 28.5 grams is not a violation of the law." We disagree. A defendant cannot be convicted of two counts of possession of marijuana "merely because various portions of the prohibited contraband possessed by him at the specified time are kept or deposited in different places." (*People v. Theobald* (1964) 231 Cal.App.2d 351, 353.) Similar reasoning applies here: when a defendant's possession of marijuana is unlawful, then the police or the court cannot be required to divide it up into portions that can be lawfully possessed. There is no language in section 11362.1 imposing this requirement, and "we avoid any [statutory] construction that would produce absurd consequences." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 578.)

Herbert relies on *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, in which the court denied a petition for a writ of mandate seeking to vacate an order

[6] Herbert claims—without citing any authority—that "under Proposition 64, marijuana is not a Schedule I controlled substance, rather marijuana is lawful and not subject to the requirements under section 11473.5." This statement is plainly incorrect.

requiring the city to return marijuana to a defendant. (*Id.* at pp. 362, 364.) The case is inapposite. In *City of Garden Grove*, the police "seized about a third of an ounce of marijuana" from a defendant who had a doctor's approval to use it for medical reasons. (*Id.* at p. 362.) In denying the petition, the court relied in part on "the prosecutor's implied determination that for purposes of state law, [the defendant] was in legal possession of the marijuana that was found in his car." (*Id.* at p. 376.) But here Herbert's possession of over a pound of marijuana was unlawful. (§§ 11357, subd. (b)(2), 11362.1, subd. (a)(1).)

III. *Herbert's Remaining Arguments Fail*

In arguing a violation of his federal due process rights, Herbert points out that he "was never charged with a marijuana-related offense and there is no pending criminal prosecution against him for any offense related to his possession of the marijuana." He contends there is "no legal basis to continue to withhold the one ounce . . . that he is legally entitled to possess." But section 11473.5, subdivision (a), requires the destruction of "[a]ll seizures of controlled substances . . . in [the] possession of any city, county or state official . . . as the result of a case in which no trial was had . . . unless the court finds that the controlled substances . . . were lawfully possessed . . . ." Neither a marijuana-related offense nor a pending criminal prosecution are prerequisites to the destruction of a controlled substance pursuant to section 11473.5.

Herbert argues the trial court's ruling violates the rule of "lenity," and that we should construe section 11362.1 in a manner that favors the defendant. But this rule "is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise . . . ." (*People v. Jones* (1988) 46 Cal.3d 585, 599.) When the amount seized is more than 28.5 grams, and no other provision of law makes the possession lawful, then it is not reasonable to interpret section 11362.1 as requiring the return of 28.5 grams of the marijuana seized.

Herbert argues that "opposing counsel" failed to follow proper forfeiture procedures. Herbert relies primarily on section 11488.4, which applies to the forfeiture of "moneys, negotiable instruments, securities, or other things of value seized or subject

to forfeiture," and it applies when they "are not automatically made forfeitable or subject to court order of forfeiture or destruction by another provision of this chapter . . . ." (§ 11488.4, subd. (a)(1).) Here, the court was required to order the destruction of the marijuana found in Herbert's car under section 11473.5. Thus, neither section 11488.4 nor the requirements for forfeiture proceedings apply.

Herbert contends the Controlled Substances Act, 21 U.S.C. § 801, does not preempt Proposition 64. The Attorney General does not argue otherwise. Accordingly, we do not address the preemption argument. The court was required to order the destruction of the entire amount of the marijuana because it was unlawfully possessed under California law.

DISPOSITION

The petition is denied.

_____
Jones, P.J.

WE CONCUR:

_____
Simons, J.

_____
Burns, J.

A156832